



November 9, 1999

B. Jeannie Fry
Director-Federal Regulatory

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141

Dear Ms. Salas:

Pursuant to the Memorandum Opinion and Order ("Merger Approval Order") in the above-referenced proceeding and the express conditions ("Merger Conditions") adopted by the Commission in approving the merger between SBC Communications Inc. ("SBC") and Ameritech Corp. ("Ameritech"), the Commission staff has requested access to the pre-merger collocation audit workpapers and supporting materials. SBC and Ameritech will provide the Commission staff with access to these audit workpapers and supporting materials at the office of SBC Telecommunications, Inc. in Washington, D.C. In accordance with Paragraph 40(g) of the Merger Conditions, Section 220(f) of the Communications Act of 1934, as amended, and Section 0.459 of the Commission's rules, 47 C.F.R. 0.459, SBC is making audit workpapers and supporting materials available to the Commission with the understanding that the Commission will keep them confidential, and that the Commission will not make either the actual workpapers and supporting materials themselves, nor the contents thereof, available for public inspection.

Merger Conditions

In approving the merger between SBC and Ameritech, the Commission ruled that the "conditions [were] voluntarily submitted by SBC and Ameritech," and adopted them as express conditions of its approval of the transfer of licenses and lines from Ameritech to SBC. Merger Approval Order, at ¶ 354

The conditions require that "(p)rior to the Merger Closing Date, Ameritech and SBC shall retain one or more independent auditors acceptable to the Chief of the Common Carrier Bureau to perform an examination engagement and issue an attestation report resulting in a positive opinion (with exceptions noted) regarding whether the terms and conditions offered in tariffs and amendments to interconnection agreements, and the methods and procedures put in place by SBC and Ameritech to implement those terms and conditions, comply with the

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collocation requirements contained in the Collocation and Advanced Services Order.” Merger Conditions at ¶ 39. SBC and Ameritech completed the required pre-merger collocation audit, and filed the audit reports with the Commission on October 14, 1999.¹

The conditions further require that “(t)he Commission shall have access to working papers and supporting materials of the independent auditor,” and that “(t)he Commission’s review of the working papers and supporting materials shall be kept confidential pursuant to the Commission’s rules and procedures.” Merger Conditions, at ¶¶ 39 and 40g.

Accordingly, in accepting SBC’s voluntary agreement to conduct a pre-merger collocation audit and to provide access to the audit workpapers and supporting materials to the Commission as a condition of the merger, and in ruling that the Commission’s review of those workpapers and materials will be “kept confidential,” the Commission has already ruled that the audit workpapers and supporting materials will be withheld from public inspection.

Section 220 of the Communications Act

In addition to the Merger Approval Order and Merger Conditions, there is independent statutory authority for preserving the confidentiality of these audit workpapers and supporting materials.

Section 220(c) of the Communications Act of 1934, as amended, provides that “the Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers....” Further, Section 220(f) provides that “(n)o member, officer, or employee of the Commission shall divulge any fact or information which may come to this knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by the court.”

Thus, under the Communications Act itself, the Commission has a right of access to these workpapers and materials, provided that any facts or information contained therein is not divulged by the Commission.

Commission’s Rules

Moreover, the Commission’s own rules prescribe the records that are not routinely made available for public inspection, and further provide that “any persons submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection.” Sections 0.457 and 0.459(a), 47 C.F.R. 0.457 and 0.459(a). In addition, “if the materials are submitted voluntarily..., the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied.” Section 0.459(d), 47 C.F.R. 0.459(d).

¹ Letter from Charles E. Foster to Magalie Roman Salas dated October 14, 1999.

The pre-merger collocation audit workpapers and supporting materials contain confidential, highly sensitive proprietary and privileged commercial information under 5 U.S.C. 552(b)(4) and Section 0.457(d) of the Commission's rules. Exemption 4 of the Freedom of Information Act shields information which is (1) commercial or financial in nature; (2) obtained from a person; and (3) privileged or confidential. *See Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F.2d 252, 266-267 (D.C. Cir. 1982). The information in question clearly satisfies all three elements of that test. It contains commercially sensitive information including notes made by auditors when they interviewed SBC and Ameritech employees concerning the development and provision of collocation services, and various documents detailing the internal operation and business practices involved in this development and provisioning of such services.

With respect to the third element of the above test, information is considered to be "confidential" if disclosure "is likely to (1) impair the government's ability to obtain necessary information in the future," *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks I*"); *Washington Post Co. v. U.S. Department of Health and Human Services*, 690 F.2d 252, 268-269 (D.C. Cir. 1982). The Commission has specifically held that disclosure of data gathered by the Commission under its audit authority would be likely to impair the government's future ability to obtain such data, notwithstanding the statutory authority to compel production. *See, In the Matter of Martha H. Platt On Request for Inspection of Records*, FOIA Controls Nos. 90-63, *Memorandum Opinion and Order*, 5 FCC Rcd 5742, paras. 6 and 7 (1990).

Moreover, since the Commission has found that Ameritech and SBC voluntarily agreed to the conditions of the merger, including the collocation audit conditions, and has agreed to keep its review of the work papers and supporting documents confidential, disclosure of any of this information by the Commission would reasonably be expected to have a chilling effect on parties' willingness to agree to such conditions or to provide such information in the future.

In conclusion, in accordance with the Merger Conditions, the Communications Act, and the Commission's rules, SBC is providing the Commission with access to the independent auditors' audit workpapers and supporting materials related to the pre-merger collocation audit of SBC's and Ameritech's compliance with the collocation requirements of the Collocation and Advanced Services Order. SBC understands that the Commission review shall be kept confidential. The confidential working papers and supporting materials will be maintained and made available for access by the Commission beginning November 8, 1999 at the following location:

SBC Telecommunications, Inc.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005

Copying shall be limited to those materials required by the Commission to verify compliance, and any copies shall be returned to SBC at the completion of the review.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "B. Jeannie Fry". The signature is fluid and cursive, with a long vertical stroke at the end.

B. Jeannie Fry
Director – Federal Regulatory (SBC)

cc: Ken Moran
Anthony Dale
Hugh Boyle
Radhika Karmarkar